ESTOPPEL BY ASSISTED REPRESENTATION.

An agent having authority from a company to issue warehouse receipts for goods received, fraudulently issues one to a confederate without having received the goods mentioned in it; the confederate passes the receipt to a purchaser in due course; it is agreed that the purchaser is entitled to hold the company to its receipt; and the question is, Upon what ground does he base his right?

Mr. Thaddeus D. Kenneson supports[1] the view of the Supreme Court of Georgia in The Planters' Rice-Mill Co. *v.* The Merchants' National Bank,[2] as follows:

"An agent to tell the truth may bind his principal by telling a lie. A wrongful exercise of delegated authority is not the assumption of authority, but the abuse of it. Thus, an agent empowered to issue and acknowledge receipts of a given kind, based on real transactions, does not, by wrongfully issuing and acknowledging receipts of a like kind, based on fictitious or simulated transactions, pass beyond the scope of his authority, but acts fraudulently within it. To hold otherwise would be to rule that an agent cannot commit a fraud and affect his principal by it. Here he had a rightful authority to do a certain class of acts. He did a number of those acts by the wrongful exercise of that authority. His principal must be responsible both for the authority conferred and for its faithful exercise, in so far as there is a right to rely upon the fidelity of its exercise."

And Mr. Kenneson condemns the view of the New York cases which put forward the principle that

"where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."

With proper deference to the Georgia Court I beg to suggest that either the agent had authority to issue the receipt or that he had not. If he had—if the company had really given him authority to issue receipts without deposit of goods—then of course the company is bound, and *cadit questio*. But if he had not authority, it seems to me to be useless to say that he had; and to assert that in doing something outside of his authority he was acting within it.

[1] 5 Col. Law Rev. 261. [2] (1887) 78 Ga. 574.

The given case alleges that the agent had no authority to issue the receipt in question; and yet it is said that in issuing it he did not "pass beyond the scope of his authority but acts fraudulently within it." Now inasmuch as the scope of a man's authority is no wider than his authority;[1] and inasmuch as acting fraudulently within an authority is in any case acting within it; we may reduce the proposition to this: Although the agent had no authority to issue the receipt, yet in doing so he did not pass beyond his authority but acted within it. Which seems to me equivalent to saying that the act was both within the authority and without it.

Contradiction of that sort has frequently passed criticism with the help of the phrase, "class of acts."[2] It is said (and the Georgia Court partially adopts the language) "he had * * * authority to do a class of acts; this act was within the class; therefore he had authority." So we start with "he had no authority for this particular act;" and then we affirm that he had authority to do "a class of acts" of which this was one. That is, we deny and affirm authority in the same sentence, for it appears to me to be very clear that no class can include a case that is outside of it. The mistake is made in forming the class. If the agent had authority to issue receipts in all cases—goods or no goods—then the case in hand is within the class. But if the agent had no authority in the absence of goods, then clearly enough the case is not within the class, for the clear expressly excludes the case.

So when the Georgia Court says "he had a rightful authority to do a class of acts. He did a number of those acts by the wrongful exercise of that authority," I simply urge that in issuing the receipt in question the agent did not do "one of those acts"—one of the "class of acts" included in his power. On the contrary and admittedly, the act was beyond his power.

What is the use of the generalization to "class of acts"? If it is indisputable that a given act is beyond the authority, how by any mere expansion and contraction of it—putting it into a class and taking it out again—can we bring the act within the same authority? The law may be

[1] Ewart on Estoppel, 501. [2] Ib. 502.

troublesome, but if we agree upon the facts when we begin our discussion let us adhere to them throughout.

Arguing against estoppel, Mr. Kenneson makes two points well worthy of consideration:

1. "It is not easy," he says, "to see how a principal can be estopped by a representation of his agent which is concededly false and unauthorized. That a principal may be estopped to deny the truth of his agent's representation when he has himself stated that such representation is true and some person in reliance upon such statement of the principal has acted upon the representation of the agent and suffered damage, is a doctrine that is intelligible. But when the agent makes a representation and the principal has done nothing to induce one to believe it to be true and to rely upon it, the principal cannot be estopped thereby."

With this I cordially agree. But with deference I beg to suggest (1) that the case in hand is not one in which it can be said that "the principal has done nothing to induce" the purchaser of the receipt to believe in the existence of real authority; and (2) that the case belongs to a most extensive class of cases for which I have ventured to enunciate the principle of "estoppel by assisted misrepresentation."

I have not space here fully to defend the principle, but I have some confidence that it will be assented to by those who will be kind enough to peruse what I have elsewhere said about it.[2] Shortly stated it is this:—

"One man may be estopped by a misrepresentation made by another, when the former, in breach of some duty to the deceived person, has supplied the defrauder with that which was necessary to make the representation credible. If the fraud was accomplished without assistance, there can, of course, be no estoppel (of any one but the defrauder). If, although there was assistance, yet the assistance was an immaterial factor in the accomplishment of the fraud, there ought likewise, to be no estoppel—the assistance did not furnish the occasion or the opportunity for the fraud. But if the assistance was in some way essential to the success of the fraud—furnished the occasion or opportunity for it; made credible a representation which without it could not have been successfully made—then, if there has been a breach of some duty in rendering that assistance, estoppel will ensue."

Applying this principle to cases of alleged agency, I have said:[3]

"Assisted misrepresentation will also estop. If the ostensible agent is the one who makes the representation of authority, and the supposed principal has merely assisted that representation—done that which

[1] Ewart on Estoppel, Cap. 4.

[2] Ib. pp.. 20, 11. See cases referred to in the note on p. 21.

[3] Ewart on Estoppel, 473, 4.

has made it credible—he will be as much estopped as if he had himself made the representation. For example, if I should employ a broker to sell some shares, he would appear to have all the authority usually possessed by a broker. Now suppose that I had in fact limited that authority, and the broker nevertheless acted as though it was unlimited, I would be estopped from denying his possession of customary power; because I had by my employment of that particular sort of a person, given the appearance of usual authority."

For the existence of duty in such cases I must content myself with a reference to chapter 5 of my book.

2. Mr. Kenneson's second point raises a point with which I have also to some extent[1] already dealt. It is this:

Suppose that the purchaser sues the company, not for the goods mentioned in the receipt, but for damages in deceit; how in that case can estoppel help him? If he sued for the goods, the company would plead that it never had them; and the plaintiff would reply that because of the receipt—because of the company's former assertion that it had the goods—it is now estopped to say otherwise. In this case the plaintiff declares that the receipt is true, and he holds the company to its truth by estoppel. That course is familiar enough.

But observe the contrast when the action is in deceit. Here the plaintiff does not say that the receipt is true, but that it is false—everybody is agreed upon all the facts; and there is therefore no place for estoppel, which would only help toward settlement of the facts). If then the principal is liable in deceit, it cannot be so because of estoppel. This I understand to be Mr. Kenneson's point, which I trust I have not prejudiced by a fuller statement of it.

The fallacy lies in looking for estoppel in the wrong place. Try this other view of the situation and the difficulty vanishes. The agent in giving the receipt appeared to be acting within his real authority; the Company therefore is bound by his act; his act was such that if done by the Company an action in deceit would have lain against the Company; therefore for his act such an action may be brought against the Company.

In other words, it is a mistake to fix attention merely upon the representation of the agent (that the Company

[1] Ewart on Estoppel, Cap. 19.

had the goods) and say that the estoppel of the Company is merely against a denial of its truth. That is clear enough. But it is true only because of the preceding estoppel, namely, that the Company is estopped to deny that the agent had authority to sign the receipt.

There are two estoppels: Suppose that the Company itself issued the receipt, it would be estopped to deny its truth (that the goods were on hand). This estoppel exists without intervention of agency. Now if the agent issues the receipt there is the same estoppel as when the Company issued it; but only upon the condition of the other estoppel: that the principal is estopped from denying the agency itself. This main or first estoppel is that which usually occurs, and is that which is referred to in the words "Agency by Estoppel"—that is, agency based not upon real, but upon ostensible authority.

It is now clear why the Company is liable in deceit by way of estoppel: It is estopped to deny the authority of the agent to issue the receipt, and for issue of it by the Company itself such an action would lie.

Before closing I should like to call attention to a distinction worked out in my book,[1] but not, so far as I am aware, observed elsewhere. It relates to the effect of ostensible authority, and may be stated in this way:—

"A. If an agent acts within what appears to be his authority, the principal is bound.

B. If an agent appears to be acting within his authority, the principal bound."

Observe the distinction. The A class covers the case of the broker above referred to. He appears to have authority to do all acts customarily entrusted to a broker; his act, although really unauthorized, appears to be within the authority; and therefore the principal is bound.

This reasoning, however, has no application to the receipt case which we have been discussing. The purchaser never imagined that the agent had authority to issue a receipt in the absence of goods. It cannot in such a case be said that the act was within the apparent authority—for the apparent authority was to issue receipts only against goods. For this case then we invoke the other principle (B) and

[1] p. 501, 2.

we say that the agent appeared to be acting within his real authority. In other words, in the A case the question is whether the act is really within the ostensible authority; and in the B case whether it appears to be within the real authority. There may be appearance as to the *extent* of real authority (A); and appearance as to the act being *within* the real authority (B)—appearance in relation to the authority (A), and appearance in relation to the act (B).

Within this B. class is the frequently recurring case of a partner making a firm note for his private purposes. The other partners are bound by estoppel. But not because the defrauding partner acted within his apparent authority (A), but because his act appeared to be within his real authority (B).

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